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In The
Supreme Court of The United States

OCTOBER TERM, 1959.

No. 613

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner,
vs.
J. C. MELLINS, JR.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

Statement of the Case 2

Argument 2

Discussion of Question No. One 2-5

Discussion of Question No. Two 5-6

Discussion of Questions No. Three and Four 6-8

Conclusion and Prayer 8

Certificate of Service 9

TABLE OF CASES.

Barrington v. Missouri, 205 U. S. 483, 486, 51 L. Ed. 890, 894 2

Bartlebaugh v. Penn R. Co., 82 N. E. 2d 853, 854 4

Central Vermont Ry. Co. v. White, 238 U. S. 507, 515-516, 59 L. Ed. 1433, 1438 2

C. & O. R. Co. v. Carnahan, 241 U. S. 241, 60 L. Ed. 979, 981-982 6

Chesapeake & O. R. Co. v. DeAtley, 241 U. S. 310, 60 L. Ed. 1016, 1021 ..... 2, 6

C. & O. R. Co. v. Kelly, 241 U. S. 485, 60 L. Ed. 1117, 1123 4

Chicago & N. W. R. Co. v. Candler, 283 Fed. 881, 28 A. L. R. 1174 7

Chicago & N. W. R. Co. v. Curl, 178 F. 2d 497, 502.. 7

Combs v. Chicago St. P., Minn. & Omaha Ry. Co., 135 Fed. Sup. 750 7

Gulf C. & S. F. R. Co. v. Moore, 68 S. W. 559..... 6

Gulf C. & S. F. R. Co. v. Moser, 275 U. S. 133, 73 L. Ed. 200, 202 7

H. & T. C. R. Co. v. Willie, 53 Tex. 318, 328 ..... 3, 4
Huddleston v. Dwyer, 322 U. S. 232, 88 L. Ed. 1246.. 2
Los Angeles F. & M. Co. v. Los Angeles, 217 U. S. 217, 226, 54 L. Ed. 737, 745 2
Louisville & N. R. Co. v. Gayle, 263 S. W. 763, 77 A. L. R. at 452 7
Louisville & Nashville R. Co. v. Holloway, 246 U. S. 525, 528, 61 L. Ed. 867, 870 ..... 2, 6
McGrew v. St. Louis S. F. & T. R. Co., 75 S. W. 816, 818 6
Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. Ed. 961 2
M. K. & T. R. Co. v. McFerrin, 291 S. W. 2d 931.... 7
M. K. & T. R. Co. v. Wright, 311 S. W. 2d 440, 449, 455 3
Mondou v. New York N. H. & H. R. Co., 223 U. S. 1, 56 L. Ed. 327, 348 3
N. Y. Central R. Co. v. Delich, 252 F. 2d 522, 527.... 7
O'Donnell v. Great N. R. Co., 109 Fed. Sup. 590.... 7
So. Pac. Co. v. Klinge, 65 F. 2d 85, 87, 290 U. S. 657, 78 L. Ed. 569 4
Spence v. Comm. Mtr. Freight, Inc., of Indiana, 90 O. App. 143, 127 N. E. 2d 427, 53 A. L. R. 2d 1445, 1453 5
T. & N. O. R. Co. v. Jacks, 306 S. W. 2d 790, 796.... 3
Vicksburg, etc., R. Co. v. Putnam, 118 U. S. 545, 554, 30 L. Ed. 257 ..... 4, 6
Weatherbee v. Elgin J. & E. R. Co., 191 F. 2d 302.. 5
West v. Louisiana, 194 U. S. 258, 261, 48 L. Ed. 965, 969 2
Western Union Telegraph Co. v. Simmons, 75 S. W. 822, 824 6

RULES.

R. C. P. 43a (28 U. S. C. A.—F. R. C. P.) 2

DIGESTS

15 American Jurisprudence, Sec. 334, p. 772, Note 2. 6
77 A. L. R. 1451 7
63 A. L. R. 2d 1393, 1398 8
13 Texas Jurisprudence, Damages, Sec. 85, p. 183; Sec. 87, pp. 185-186; and Sec. 88, pp. 187-188... 6
13 Texas Jurisprudence, Sec. 362, p. 601 7
24-A Texas Jurisprudence, Instructions, Sec. 68, p. 626 7

In The
Supreme Court of The United States

OCTOBER TERM, 1959.

No. 643

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner,
vs.
J. C. MULLINS, JR.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

In opposition to the Petition for Certiorari, Respondent says:

STATEMENT OF THE CASE.

The Petitioner admitted liability under the F. E. L. A., and the evidence was without dispute that the Respondent was seriously and permanently injured (see Petition, p. 31, *et seq.*; 326 S. W. 2d 269).

In essence, the only questions raised by the Petition concern the admissibility of testimony and the form of instructions given on the trial. Both subjects are governed by the rules of local practice, and present no reason for this Court to exercise its discretionary power of granting certiorari.[1]

ARGUMENT.

Discussion of Question No. One.

The Respondent could content himself with saying that by enacting the F. E. L. A., Congress made no attempt to regulate the jurisdiction of State courts or to

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1. *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, 515-516; 59 L. Ed. 1433, 1438; *Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U. S. 211, 60 L. Ed. 961; *Chesapeake & O. R. Co.* v. *DeAtley*, 241 U. S. 310, 316-317, 60 L. Ed. 1016, 1021; *Louisville & Nashville R. Co.* v. *Holloway*, 246 U. S. 525, 528, 61 L. Ed. 867, 870. Compare: *Huddleston* v. *Dwyer*, 322 U. S. 232, 88 L. Ed 1246; *Los Angeles F. & M. Co.* v. *Los Angeles*, 217 U. S. 217, 226, 54 L. Ed 737, 745; *Barrington* v. *Missouri*, 205 U. S. 483, 486, 51 L. Ed, 890, 894; and *West* v. *Louisiana*, 194 U. S. 258, 261, 48 L. Ed. 965, 969.

Indeed, if the Federal Rule of Practice controlled, perforce R. C. P. 43a (28 U. S. C. A.—F. R. C. P.) the principle of applying the most favorable view of admissibility, state or federal, would negative any error in receiving the evidence.

control or affect their modes of procedure, but merely imposed a duty on such courts when their ordinary jurisdiction is appropriate to take cognizance of the right of civil recovery arising under the Act.[2] There exists ample justification for his saying that the question of the admission of testimony, where it involves no direct or indirect construction of the Federal Statute, falls clearly within the province of the State court in declaring the local or general law.[3] However, the misconception under which Petitioner has labored in presenting Question No. One prompts us to offer some clarification.

While the term "refund annuity" was used in phrasing Interrogatory No. 15 to the witness Gammill (Petition, p. 6, S. A. 2-4), a later interrogatory inquired whether the witness' answers to No. 15 represented the present cash value of the varying sums paid out monthly over the life expectancy of the Respondent from the 12th of February, 1958, and to which question the witness answered as follows:

> "To the 19th Interrogatory the Witness answers:
>
> "My calculations in answer to Interrogatory No. 15 represent the present cash value of monthly payments of $517.00, $540.00, $575.00, $600.00 and $625.00, respectively, for the life expectancy period of J. C.

2. Employers' Liability cases (*Mondou* v. *New York N. H. & H. R. Co.*, 223 U. S. 1, 56, 56 L. Ed. 327, 348.

3. *Central Vermont R. Co.* v. *White*, 238 U. S. 507, 515-516, 59 L. Ed. 1433, 1438. The Texas Supreme Court has held evidence of the cost of annuities admissible in *H. & T. C. R. Co.* v. *Willie*, 53 Tex. 318, 328, and its Courts of Civil Appeals in *M. K. T. R. Co.* v. *Wright*, 311 S. W. 2d 440, 449, 455, and *T. & N. O. R. Co.* v. *Jacks*, 306 S. W. 2d 790, 796 (w. e. ref., n. r. e.)

Mullins, Jr., from the 12th day of February, 1958, on, and with one allowance for the investment of such present cash value at the rate of 2-1 2% per annum, compounded annually. In other words, if each of the respective single premiums for the various monthly payments specified were invested and earned 2-1 2% per annum, compounded annually, the total amount of the present cash value, together with the interest earned thereon, would be sufficient to make the respective monthly income payments for the life expectancy of Mr. J. C. Mullins, Jr., from the 12th day of February, 1958, on, *and without any residue or remainder at the end of such life expectancy period*" (S. F. 597-598). (Emphasis ours.)

Aside from the approval of this character of testimony by the Texas Supreme Court,[4] the pronouncements of this Court have suggested that the cost of annuities would be a proper guide for determining the present cash value of money.[5] Furthermore, an annuity table has been held properly admissible in evidence in an F. E. L. A. action in a decision from the 10th Circuit.[6]

The *Bartlebaugh* case[7] relied upon by Petitioner was distinguished in a later decision of the Ohio Court of Appeals on the ground that a straight annuity (as described in the response of the witness to Interrogatory 19) was

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4. *H. & T. C. R. Co.* v. *Willie*, 53 Tex. 318, 328.

5. See *Vicksburg, etc., R. Co.* v. *Putnam*, 118 U. S. 545, 554, 30 L. Ed. 257; and as suggested in *C. & O. R. Co.* v. *Kelly*, 241 U. S. 485, 60 L. Ed. 1117, 1123.

6. *So. Pac. Co.* v. *Klinge*, 65 F. 2d 85, 87 (cert. den.), 290 U. S. 657, 78 L. Ed. 569.

7. *Bartlebaugh* v. *Penn. R. Co.*, 82 N. E. 2d 853, p. 854.

inquired about in the later case rather than a refund annuity.[8] The only other case[9] relied on by Petitioner is hopelessly out of point. It turned on the proposition that the actuary could not make his calculations on the probable future gross earnings of a decedent, whereas in no event could the surviving beneficiaries have recovered more than the pecuniary contributions he would likely have made them had he lived, and necessarily, he could not have contributed his entire earnings, free of board and expense, to his family.

Lastly, the Petitioner by no means preserved an objection to the admissibility of the testimony in the trial court, or made proper motion to exclude it. There was no more than a motion to strike the deposition on the grounds as asserted by Counsel Sellers (S. F. 599), that Respondent was not a dead man, and, as asserted by Counsel Touchstone (S. F. 600), that the testimony assumed the Respondent's income was going to remain as it was, and possibly grow greater throughout his life.

We respectfully urge that there is no merit in Petitioner's contention that certiorari could be granted on its First Question.

Discussion of Question No. Two.

The testimony complained of in Petitioner's Second Question was offered under allegations of a change in the nervous and mental make-up of Respondent, including

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8. *Spence v. Comm. Mtr. Freight, Inc. of Indiana*, 90 O. App. 143, 127 N. E. 2d 427, 53 A. L. R. 2d 1445, 1453.

9. *Weatherbee v. Elgin J. & E. R. Co.*, 191 F. 2d 302.

personality changes,[10] and of mental and physical pain and anguish past and future.[11] A medical witness offered by Petitioner testified that personality changes could be objective to one observing them, and that the physician had to accept the word of the family on whether or not the changes had occurred.[12] Damages for mental pain and anguish are recoverable both under Texas law and the F. E. L. A.[13]

The testimony under attack bore directly on this issue and was admissible under Texas practice.[14]

Discussion of Questions No. Three and Four.

Since Questions Three and Four both complain of the instructions given by the trial court on the issue of damages, Respondent has grouped them for reply. In the first place, all complaint at the instructions partakes of criticisms as to form, the correctness of which is governed by the decisions of the highest State court.[15] Irrespective of the State rule, however, the language of the Court's charge (S. A. 19-20, Tr. 10) on the subject of present cash

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10. Tr. 4, lines 20-23.

11. Tr. 6, lines 8-13.

12. S. F. 462-463.

13. 13 Tex. Jur., Damages, Sec. 85, p. 183 Sec. 87, pp. 185-186; and Sec. 88, pp. 187-188; *Vicksburg, etc., R. Co.* v. *Putnam*, 118 U. S. 545, 554; and *C. & O. R. Co.* v. *Carnahan*, 241 U. S. 244, 60 L. Ed. 979, 981-982.

14. *McGrew* v. *St. Louis S. F. & T. R. Co.*, 74 S. W. 816, 818 (w. e. dism. w. o. j.); *Gulf C. & S. F. R. Co.* v. *Moore*, 68 S. W. 559 (err. ref.); *Western Union Telegraph Co.* v. *Simmons*, 75 S. W. 822, 824 (ref. rec. w. e.); and for general rule, see 15 Am. Jur., Sec. 334, p. 772, Note 2.

15. *C. & O. R. Co.* v. *DeAtley*, 241 U. S. 310, 316, 60 L. Ed. 1016, 1020; *Louisville & Nashville R. Co.* v. *E. S. Holloway*, 246 U. S. 525, 62 L. Ed. 867, 870.

value of future earnings is practically identical with the charge requested and held wrongfully refused by this Court in an earlier case under the F. E. L. A.[16]

Just as Petitioner suggests (his brief p. 15), the Charge it requested would have improperly required the discount of future pain and suffering of the Respondent, for which there could have been no logical basis.[17] Furthermore, the Charge (see S. A. 22) requested by Petitioner was properly refused under Texas rules of practice and procedure. It is couched somewhat in the veip of *Deor's Lament* throughout the first paragraph, and falls within the State prohibition of charges which are erroneous, inapplicable, invasive of the jury's province, abstract, ambiguous, or unintelligible, misleading, argumentative, and unnecessary.[18] In addition to the defects summarized, the Charge had not a shred of pleadings in support of the dour facts catalogued in its first paragraph, for which reason it was properly refused.[19]

Question No. Three may be disposed of by the statement that both in Texas[20] and under the Federal Practice[21]

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16. *Gulf C. & S. F. R. Co.* v. *Moser*, 275 U. S. 133, 73 L. Ed. 200, 202.

17. *Louisville & N. R.* v. *Gayle*, 263 S. W. 763, 77 A. L. R. at 452; *Chicago & N. W. R. Co.* v. *Candler*, 283 Fed. 881, 28 A. L. R. 1174; and 37 A. L. R. 1451.

18. 24-A Tex. Jur., Instructions, Sec. 68, p. 626.

19. 13 Tex. Jur., Sec. 362, p. 601.

20. *M. K. & T. R. Co.* v. *McFerrin*, (Sup. Ct.), 291 S. W. 2d 931.

21. *N. Y. Central R. Co.* v. *Delich*, 252 F. 2d 522, 527; *Combs* v. *Chicago St. P., Minn. & Omaha Ry. Co.*, 135 Fed. Supp. 750; *O'Donnell* v. *Great N. R. Co.*, 109 Fed. Supp. 590; *Chicago N. W. R. Co.* v. *Curl*, 178 F. 2d 497, 502.

the giving of a charge that the jury should consider that an injured person will not have to pay income tax on his recovery in a damage suit would be improper. Indeed, the great weight of authority condems the giving of any such charge.[22]

Conclusion.

We respectfully urge that the Petition for Certiorari presents frivolous questions that can claim no special or important reason for the granting of the Writ, and pray its refusal.

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By: .....,
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.....

22. 63 A. L. R. 2d 1393, 1398.

I, FRANKLIN JONES, one of the attorneys for the Respondent in the above case hereby certify that a true copy of the foregoing brief was on the ... day of January, A. D. 1960, duly mailed to Mr. O. O. Touchstone, 405-1416 Commerce Building, Dallas 1, Texas, Attorney of Record for Petitioner, to Messrs. Joseph R. Brown and C. H. Rimann, 114 West 11th Street, Kansas City 5, Missouri; and to Grover Sellers, Sulphur Springs, Texas.

....,

Of Counsel.